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Perspective

CDC's new rule to track and quarantine travellers

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On 21 March 2017, the Final Rule for Control of Communicable Diseases became effective.¹

The Rule codifies the Centers for Disease Control and Prevention's (CDC's) authority to apprehend, isolate and quarantine a person (regardless of citizenship or nationality) arriving into the US from foreign countries or travelling between US states or territories, who is suspected of being infected, or at risk of being infected, with one of the nine diseases on the US quarantine list (cholera, plague, diphtheria, small pox, yellow fever, infectious tuberculosis, viral haemorrhagic fevers (like Ebola), severe acute respiratory syndrome (SARS) and influenza) that can cause a pandemic.¹ The Rule also strengthens federal surveillance of travellers for symptoms of non-quarantinable diseases like measles, pertussis and meningococcal disease.¹

While proponents praise that the Rule enables the CDC to better respond to outbreaks and other public health threats associated with travel, critics have been arguing since the CDC first published the Notice of Proposed Rule Making (NPRM) in August 2016² that it is an example of government overreach which poses a risk to civil liberties.³

Heightened Surveillance

While seen by some as a new attack on civil liberties, much of the Rule merely codifies existing practices. The CDC can use those powers without this Rule, so essentially the Rule is clarifying and limiting the CDC's powers, rather than expanding them. Although the Rule does not expand the authority granted to the CDC by Congress to place individuals into quarantine or isolation, nor does it change the formal list of diseases subject to federal isolation or quarantine, which is established only by an Executive Order of the President, CDC can now target a wider range of persons to assess and screen. It also has sufficient flexibility to respond to new diseases, because of the breadth and scope of the definition of 'illness' in the Rule, as new and

unknown illnesses are emerging continually. Also, the new definition allows the CDC Director to update the definition through notice in the Federal Register if new information suggests that additional signs or symptoms should be reported to limit the risk of disease spread through travel.¹

CDC recognizes that states have primary authority for quarantine and isolation within their borders. CDC exercises its federal authority to isolate an ill person or quarantine an exposed individual only in limited situations where states do not have jurisdiction (for instance, CDC has employed its authority at international airports and land border crossings) or in time-sensitive situations where state and local public health authorities may not have an opportunity to react in time or where measures taken by these authorities are inadequate to prevent communicable disease spread. CDC may also exercise its authority if a state or local authority seeks assistance from CDC.

The Rule includes new reporting requirements for airplanes and ships.¹ Airline pilots and ship operators would be required to report not only deaths on board but also certain overt and common signs and symptoms of sick travellers to the CDC.¹ In the NPRM, the CDC pointed to the ongoing persistence of measles in the US as an example of why the updated rules are necessary, even though measles is not a quarantinable disease.² In the Rule, measles outbreaks in the US were again highlighted.¹ Because of its extremely high transmissibility, measles illustrates why travellers with a rash or cough could merit scrutiny and reporting to the CDC by airline and other public transportation personnel.

Critics and Responses

Although the CDC's public health goals are laudable, critics are concerned that the provisions outlined in the NPRM would trammel the civil liberties.³ For example, the NPRM gave the CDC ultimate authority to carry out medical tests and treatments, stating that 'the individual's consent shall not be considered as a

Table 1. Due process protections

Written order	<p>The right to a written order that explains the reasons why the CDC considers quarantine or isolation to be necessary and a traveller's rights if held in federal quarantine or isolation</p> <p>The right to have this written order served on the traveller within 72 h after being apprehended</p> <p>The right to have CDC reassess its written order within 72 h after it is served on a traveller to ensure that the CDC has not made a mistake, that there is a continued public health need for federal quarantine or isolation, and that the CDC is using the least restrictive means to protect the public's health</p>
Adequate necessities	The right to adequate food and water, appropriate accommodation, appropriate medical treatment, and means of necessary communication while apprehended or if held in federal quarantine or isolation
Medical review	<p>The right to request a medical review after the CDC has reassessed its written order and if the CDC has determined that quarantine or isolation is still necessary</p> <p>The right to have a medical review conducted by a medical reviewer and to have the medical reviewer make findings of fact, issue a report and recommendation to the CDC Director, and make his/her own determination as to whether the CDC is using the least restrictive means to protect the public's health</p> <p>The right to present witnesses and testimony at the medical review, and to be represented at the medical review by either an advocate at a traveller own expense, or, if indigent, to have representatives appointed at the government's expense</p>
Court access	Acknowledgement that a traveller still has the right to go to court

prerequisite to the exercise of any authority'.² Some feared that the 'emphasis on measles' could lead to discrimination against unvaccinated people and make them afraid to travel on planes or ships, potentially resulting in government coerced vaccination.

To address these concerns, the Rule makes substantial changes from the NPRM, affording more extensive due process protections (Table 1).¹ Notably, this Rule does not authorize compulsory vaccination, medical testing, or medical treatment. When a medical examination is ordered as part of an isolation or quarantine order, the medical exam is conducted by trained clinical staff at a hospital who are responsible for obtaining informed consent.¹ The Rule explicitly states that it does not affect the constitutional or statutory rights of individuals to obtain judicial review of their federal detention.¹ Individuals who are detained in federal isolation or quarantine may file a petition for a writ of habeas corpus as appropriate.¹

Nevertheless, some cautioned the Rule could still represent a danger to civil liberties. For example, the Rule would allow the CDC to hold someone in quarantine for 72 h before their case is subject to review. And that review would be conducted by the CDC itself instead of an outside, objective entity.³

Moreover, as the federal government more closely monitors almost all signs of illness in all travellers, critics worry that people will be detained or at least monitored when they are not a real risk because many serious contagious diseases share symptoms with benign conditions like common cold. Such power could allow people to be wrongly detained. The distrust and confusion will be exacerbated if people fear that they will be detained unfairly. And if health workers share those fears, they will be unwilling to travel to outbreak zones to help.⁴

Discussion and Conclusion

Recent communicable disease outbreaks (e.g. SARS, H1N1, Ebola) expose existing inadequacies in US public health preparedness.⁵ In today's modern age of quick and affordable travel, actions like the CDC's Rule are constitutional⁶ and justified to protect the public's health and national security,⁵ even at the cost of some limitation of individual liberties. Historically, courts were unwilling to review police powers unless the degree

of restriction of personal liberty was found to be unconscionable. Courts favoured health activities necessary for the defense of the common good even if they intruded upon private action to some degree. For example, a district court dismissed a challenge to an isolation order of a woman coming into the US from an area that was infected with small pox.⁷ As recently as 2003, courts supported state and federal government's authority to isolate and quarantine when the need arises.⁸

The Rule also meets due process requirements, assessed under the balancing test.⁹ The Rule strikes a balance between promoting the public's health and protecting individual rights. Our jurisprudence also does not require a review by someone outside the CDC; a CDC official can be considered a neutral decision maker, absent indication of bias. Although the 'clear and convincing' standard of evidence is generally needed to justify deprivations of liberty interests,¹⁰ CDC can rationalize a lower threshold of 'reasonable beliefs' of an individual's infection where the public health threat is substantial. Finally, the Rule does not limit existing options of judicial review; instead, it adds to them by providing an in-agency review mechanism that will almost certainly be more expeditious.¹

Recent outbreaks reinforce the need better governmental responses to detect, prevent, and treat emerging infectious conditions. The Rule is consistent with scientific principles and best practices of modern isolation and quarantine, and in line with US obligations under the International Health Regulations. When applying the Rule, however, the CDC must be careful not to infringe more than necessary on individual rights and use the least restrictive means to protect the public's health. CDC should be committed to protecting the privacy of personally identifiable information collected about travellers. It's imperative that emergency health measures are grounded in scientific evidence and guided by the Rule's due process framework to protect people from wrongful deprivation of their liberties. Federal officials applying the Rule should act based on science and evidence and not on politics and fear.

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References

1. Centers for Disease Control and Prevention. Control of communicable diseases. Final rule. *Fed Regist* 2017; 82: 6890–6978.
2. Centers for Disease Control and Prevention. Control of communicable diseases. *Fed Regist* 2016; 81: 54230–54316.
3. Stein R. CDC Seeks Controversial New Quarantine Powers To Stop Outbreaks. <http://www.npr.org/sections/health-shots/2017/02/02/512678115/cdc-seeks-controversial-new-quarantine-powers-to-stop-outbreaks>. (4 August 2017, date last accessed).
4. Miles SH. Kaci Hickox: public health and the politics of fear. *Am J Bioeth* 2015; 15: 17–9.
5. Gostin LO, Hodge JG Jr. Reforming federal public health powers: responding to national and global threats. *JAMA* 2017; 317: 1211–2.
6. Jacobson v. Massachusetts, 25 S. Ct. 358, 361 (1905).
7. United States v. Shinnick, 219 F. Supp. 789 (E.D.N.Y. 1963).
8. Best v. Bellevue Hosp. New York, NY, 115 F. App'x 459 (2d Cir. 2004).
9. Matthew v. Eldridge, 424 U.S. 319 (1976).
10. Addington v Texas, 441 US 418, 425 (1979).